

OCEAN DISCHARGE CRITERIA AND MARINE PROTECTED AREAS: OCEAN WATER QUALITY PROTECTION UNDER THE CLEAN WATER ACT

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Abstract: In May 2000, President Clinton issued his Marine Protected Area Executive Order, which, *inter alia*, required EPA to use its existing authority under the Clean Water Act to protect ocean waters. In response, EPA drafted new ocean discharge criteria for the first time since 1980. This article discusses these new ocean discharge criteria, concluding that the Clean Water Act needs to be amended to allow EPA to promulgate water quality standards, which have more far-reaching protections than do ocean discharge criteria for ocean and coastal waters.

INTRODUCTION

Oceans cover 71% of the Earth's surface.¹ They are rich in renewable resources and provide us with many valuable products, including a great deal of food.² For example, more fish are produced globally than cattle, sheep, poultry, or eggs; moreover, fish constitutes the world's largest source of wild and domestic protein.³ In the United States alone, "ocean and coastal habitats support some of the

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¹ OCEAN VOICE INTERNATIONAL at <http://www.ovi.ca> (last visited Sept. 28, 2001).

² *Id.*

³ OCEAN VOICE INTERNATIONAL, OCEAN FACTS, at http://www.ovi.ca/fact_main.htm (last visited Sept. 28, 2001) [hereinafter OCEAN FACTS].

most valuable and diverse biological resources on the planet, including 66% of all U.S. commercial and recreational fish and shellfish, 45% of all protected species, 50% of non-game migratory birds, 30% of migratory waterfowl, and thousands of other species.”⁴ The Environmental Protection Agency (EPA) recently summarized the national importance of ocean and coastal waters as follows:

Ocean and coastal waters include some of the most biologically diverse and productive habitats known. Roughly two-thirds of the fish and shellfish caught commercially in US waters depend on healthy ocean and coastal waters to support critical periods of their life cycles. Our oceans and coasts are also among the most economically productive areas as well. The coastal recreation and tourism industry is the largest employer in the Nation, and the second largest contributor to the U.S. Gross Domestic Product, serving 180 million Americans visiting the coasts every year. The commercial fish and shellfish industry contributes \$45 billion to the economy every year, while recreational fishing contributes \$30 billion to the U.S. economy annually. Healthy oceans are essential to the Nation’s economy and national heritage.⁵

The federal government thus recognizes the critical importance of ocean habitats to our national welfare.

Despite the importance of healthy oceans, there is evidence that our ocean and coastal waters are being degraded. Nearshore ocean waters, for instance, are highly susceptible to pollution, particularly from “adjoining surface and ground waters, nonpoint source runoff, and wastewater discharges [T]hese waters are under ever increasing pressure from rising coastal populations which increase demands on space and resources.”⁶ Presently, fifteen of the world’s largest fisheries are over-fished or in danger of becoming over-fished.⁷ The most recent National Water Quality Inventory shows that more than 40% of the nation’s waters are unfit for fishing or swimming, and 44%

⁴ ENVIRONMENTAL PROTECTION AGENCY, OCEAN DISCHARGE CRITERIA: REVISIONS TO THE OCEAN DISCHARGE CRITERIA REGULATIONS 36 (2001), *available at* http://www.epa.gov/owow/oceans/protecting_oceans/cwa403rule.pdf [hereinafter EPA OCEAN DISCHARGE CRITERIA REVISIONS].

⁵ *Id.* at 5.

⁶ *Id.* at 6.

⁷ OCEAN FACTS, *supra* note 3.

of assessed estuarine waters are impaired.⁸ In 1998, 2500 fish consumption permits were issued, a 9% increase from the previous year.⁹ At the same time, however, regulators restricted fish consumption because of contaminants or pollutants detected in those fish,¹⁰ such as dioxin and mercury, which also have been found in ocean waters.¹¹ In addition, in 1999, problems of pollution and erosion forced environmental management departments to post 6000 beach warnings.¹²

To further protect our oceans, President Clinton issued Executive Order No. 13158 for Marine Protected Areas (MPA Executive Order) in May 2000.¹³ A marine protected area (MPA) is "any area of the marine environment that has been reserved by federal, state, territorial, tribal, or local laws or regulations to provide lasting protection for part or all of the natural and cultural resources therein."¹⁴ MPAs are important not only for the protection of substantial natural resources but also for the economic benefits they provide (i.e., through fishery management) and for the conservation and protection of our cultural marine heritage.¹⁵ At the federal level, the National Oceanic and Atmospheric Administration (NOAA) facilitates the National Marine Sanctuary Program, which helps to enforce the nation's system of MPAs and to conserve, protect, and enhance their biodiversity, ecological integrity and cultural legacy.¹⁶ This program's goals include restoring and rebuilding marine habitats or ecosystems to their natural condition as well as monitoring and maintaining existing healthy areas.¹⁷

By signing the MPA Executive Order, President Clinton sought to increase the protection and reduce the pollution of ocean and coastal waters and to preserve the natural and cultural resources of the ma-

⁸ OFFICE OF WATER, ENVIRONMENTAL PROTECTION AGENCY, WATER QUALITY CONDITIONS IN THE UNITED STATES: A PROFILE FROM THE 1998 NATIONAL WATER QUALITY INVENTORY REPORT TO CONGRESS *available at* <http://www.epa.gov/305b/98report/98summary.html> (last visited Sept. 28, 2001).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ Exec. Order No. 13,158, 65 Fed. Reg. 34,909 (May 26, 2000).

¹⁴ *Id.* at 34,909, § 2(a).

¹⁵ *See id.* at 34,909, § 1.

¹⁶ NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, NATIONAL MARINE SANCTUARIES *available at* <http://www.sanctuaries.nos.noaa.gov/natprogram/natprogram.html> (last visited Sept. 28, 2001).

¹⁷ *Id.*

rine environment for future generations.¹⁸ The President stated the Executive Order's objectives as follows:

To this end, the purpose of this order is to, consistent with domestic and international law: (a) strengthen the management, protection, and conservation of existing marine protected areas and establish new or expanded MPAs; (b) develop a scientifically based, comprehensive national system of MPAs representing diverse U.S. marine ecosystems, and the Nation's natural and cultural resources; and (c) avoid causing harm to MPAs through federally conducted, approved, or funded activities.¹⁹

The MPA Executive Order thus emphasizes the importance of preserving the Nation's cultural and natural marine heritage.²⁰

The ultimate goal of the MPA Executive Order is to develop a large national system of state and federal MPAs.²¹ To further facilitate ocean protection, President Clinton also ordered EPA to develop and enforce specific standards to protect the quality of ocean waters.²² Specifically, section 4(f) of the MPA Executive Order requires EPA to propose new regulations that ensure additional protection of MPAs.²³ That section provides:

To better protect beaches, coasts, and the marine environment from pollution, the Environmental Protection Agency (EPA), relying upon existing Clean Water Act authorities, shall expeditiously propose new science-based regulations, as necessary, to ensure appropriate levels of protection for the marine environment. Such regulations may include the identification of areas that warrant additional pollution protections and the enhancement of marine water quality standards.²⁴

Accordingly, EPA possessed a presidential mandate to increase protections for the marine environment.

President Clinton apparently intended for EPA's new regulations to cover broad reaches of the ocean, because the MPA Executive Or-

¹⁸ See Exec. Order No. 13,158, 65 Fed. Reg. 34,909.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² See *id.*

²³ See *id.* at 34,911.

²⁴ Exec. Order No. 13,158, 65 Fed. Reg. at 34,911.

der defines “marine environment” as “those areas of coastal and ocean waters, the Great Lakes and their connecting waters, and Submerged Lands thereunder, over which the United States exercises jurisdiction, consistent with international law.”²⁵ Based on this language, EPA’s new regulations could affect all ocean and coastal waters subject to U.S. jurisdiction.

In response to President Clinton’s MPA Executive Order, EPA gave notice and held meetings regarding possible revisions to its Clean Water Act (CWA) ocean discharge criteria regulations.²⁶ Established pursuant to section 403 of the CWA, ocean discharge criteria address the effects of pollutant disposal in marine waters, thereby providing specific requirements that do not apply to internal fresh waters.²⁷ Section 403(c)(1) in particular requires the EPA Administrator to “promulgate guidelines for determining the degradation of the waters of the territorial seas, the contiguous zone, and the oceans,”²⁸ and these guidelines—the ocean discharge criteria—must become a part of any permit that EPA or a state issues for discharges of pollutants into ocean and coastal waters.²⁹ EPA described this regulatory system as follows:

In 1972, Congress passed the Federal Water Pollution Control Act, commonly known as the Clean Water Act (CWA). Under the CWA, point source discharges (*i.e.*, discharges from municipal and industrial facilities) to waters of the United States must obtain a National Pollutant Discharge Elimination System (NPDES) permit, which requires compliance with technology- and water quality-based treatment standards. In addition, because of the complexity and environmental significance of marine ecosystems, discharges to the marine environment beyond the baseline (*i.e.*, the territorial sea, contiguous zone, and oceans) must also comply with section 403 of the CWA (section 403), which specifically addresses impacts from such point sources on marine resources.³⁰

²⁵ *Id.* at 34,909.

²⁶ Ocean Discharge Criteria: Revision to Ocean Discharge Criteria Regulations: Notice of Public Meetings, 65 Fed. Reg. 42,936, 42,936–37 (July 12, 2000).

²⁷ See 33 U.S.C. § 1343 (1994).

²⁸ *Id.* § 1343(c)(1).

²⁹ *Id.* § 1343(a).

³⁰ Ocean Discharge Criteria: Revision to Ocean Discharge Criteria Regulations: Notice of Public Meetings, 65 Fed. Reg. at 42,937.

EPA concluded, moreover, that the most appropriate way to implement the MPA Executive Order would be to revise the section 403 ocean discharge criteria.³¹

EPA's proposed rules implementing the MPA Executive Order retained this focus on ocean discharge criteria.³² Nevertheless, those rules took the form of water quality standards. These standards provided a baseline that would apply to "ocean waters beyond three miles offshore."³³ These waters, "designated as 'Healthy Ocean Waters,' would be protected by both a narrative statement of desired quality and pollutant-specific numeric criteria."³⁴ Water quality standards, governed by section 303 of the CWA, are generally state-set standards for protecting water quality that most obviously apply to "navigable waters" under the CWA—that is, to the nation's internal waters and the three-mile-wide territorial sea.³⁵ Unlike ocean discharge criteria, however, state water quality standards trigger additional requirements under the CWA, such as state certification requirements under section 401,³⁶ water quality based effluent limitation requirements under section 302,³⁷ and total maximum daily load (TMDL) requirements under section 303.³⁸

In its proposed rules, EPA specifically relied on section 403 for its authority to promulgate ocean water quality standards.³⁹ Thus, EPA effectively created hybrid regulatory requirements for discharges into marine waters by regulating through both ocean discharge criteria and water quality standards.⁴⁰

These proposed rules raise several issues regarding EPA's role in protecting ocean water quality, including: (1) whether EPA has the authority under the CWA to set water quality standards for federally-controlled open ocean waters; (2) whether the hybrid standards EPA created are best considered ocean discharge criteria, water quality standards, or both; and (3) whether, relying on these hybrid requirements, EPA can or must use other sections of the CWA to control in-

³¹ *Id.*

³² See generally EPA OCEAN DISCHARGE CRITERIA REVISIONS, *supra* note 4.

³³ *Id.* at 1.

³⁴ *Id.* at 12.

³⁵ See 33 U.S.C. §§ 1313(a), 1362(7)–(8) (1994) (requiring states to set water quality standards for the waters under their control, and defining "navigable waters" and "territorial seas" respectively).

³⁶ *Id.* § 1341(a).

³⁷ *Id.* § 1312(a).

³⁸ *Id.* § 1313(d).

³⁹ *Id.* § 1343.

⁴⁰ See *id.*

direct discharges and nonpoint discharges that impair ocean water quality. Moreover, although EPA's proposed rules had been stalled in response to President Bush's January 2001 "Regulatory Review Plan,"⁴¹ the Bush Administration has now adopted Executive Order No. 13,158⁴² and is beginning to implement it.⁴³ In December 2001, EPA announced that it would propose its new ocean discharge criteria in April 2002 and that it expected to issue final rules in April 2002.⁴⁴ Despite the change in presidential administration, therefore, the legal status of EPA's new ocean discharge criteria and their potential additional legal effects under the Clean Water Act remain viable issues.

This article begins by reviewing the traditional divisions of regulatory authority between the states and the federal government as well as the CWA's structure for protecting ocean water quality. The article then goes on to discuss EPA's most recent proposed amendments to the ocean discharge criteria. It concludes that EPA does have the regulatory authority to set water quality standards for the oceans but that the proposed hybrid requirements fall short of fulfilling EPA's section 403 obligations. In addition, this article argues that even if EPA chooses to promulgate water quality standards for ocean waters, the provisions of the CWA that build on water quality standards will not apply, leaving EPA with little authority and no responsibility to address state-based sources of water pollution that jeopardize ocean water quality, especially nonpoint sources of pollution.

I. BASIC FEDERAL AND STATE REGULATORY JURISDICTION OVER THE OCEANS

In response to the MPA Executive Order, EPA drafted rules that would establish regulatory requirements for the ocean; however, EPA effectively limited the new requirements' applicability to a coastal zone located three to 200 miles offshore.⁴⁵ EPA's self-imposed limitation reflects basic jurisdictional divisions between the state and federal governments regarding the ocean. However, it also raises ques-

⁴¹ Regulatory Review Plan, 60 Fed. Reg. 7701 (Jan. 24, 2001); *see also* EPA OCEAN DISCHARGE CRITERIA REVISIONS, *supra* note 4, at 1.

⁴² Press Release, Donald L. Evans, Secretary of Commerce, Supplement To Executive Order 13,158 (June 4, 2001), *available at* http://mpa.gov/frontmatter/sup2_evansstatement.html (last visited Oct. 26, 2001).

⁴³ *See generally* Marine Protected Areas of the United States, *available at* <http://mpa.gov> (last visited Oct. 26, 2001).

⁴⁴ 66 Fed. Reg. 62,368, 62,370 (May 14, 2001).

⁴⁵ Ocean Discharge Criteria: Revision to Ocean Discharge Regulations: Notice of Public Meetings, 65 Fed. Reg. 42,936, 42,937 (July 12, 2000).

tions regarding the EPA's authority to regulate more extensively, particularly discharges close to shore that may impair ocean water quality. This jurisdictional issue is significant because the MPA Executive Order directs EPA to propose regulations to protect the entire marine environment.

The ocean is not a unified body for regulatory purposes. The history of divided regulatory authority over the ocean between state and federal governments is a complex progression originating from the concept of "navigable waters."⁴⁶ As a result of the Revolutionary War, the original thirteen colonies acquired sovereign rights, including ownership of the beds and banks of "navigable waters."⁴⁷ Through the equal footing doctrine,⁴⁸ the United States Supreme Court later extended this ownership of beds and banks of navigable waters—and subsequent regulatory control over the waters themselves—to include all other states subsequently admitted to the Union.⁴⁹ "Navigable waters," for purposes of state title, include not only waters that were navigable in fact at the time of statehood⁵⁰ but also waters that are subject to the ebb and flow of the tide.⁵¹

State sovereignty clearly applies to the internal navigable waters within a state's borders, and both definitions of "navigable waters"—navigable in fact and subject to the ebb and flow of the tide—suggest that states have jurisdiction over at least some ocean waters.⁵² In 1947, however, the Supreme Court refused to recognize states' claims to the band of ocean waters along their coasts.⁵³ In *United States v. California*, the federal government conceded that "California has a qualified ownership of lands under inland navigable waters such as rivers, harbors, and even tidelands down to the low water mark,"⁵⁴ but refused to recognize California's claims to a three-mile wide belt of waters along the California coastline based on the original thirteen colonies' acquisition of sovereignty and the equal footing doctrine.⁵⁵ The Supreme Court agreed with the federal government, noting that "[a]t the time this country won its independence from England there was no settled international custom or understanding among nations that

⁴⁶ See *Shively v. Bowlby*, 152 U.S. 1, 57 (1894).

⁴⁷ *Id.*

⁴⁸ See *Pollard's Lessee v. Hagan*, 44 U.S. 212, 223 (1845).

⁴⁹ *Shively*, 152 U.S. at 57; see *Pollard's Lessee*, 44 U.S. at 224.

⁵⁰ See *United States v. Appalachian Power Co.*, 311 U.S. 377, 407–09 (1940).

⁵¹ See *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 478–81 (1988).

⁵² See *id.*; *Appalachian Power Co.*, 311 U.S. at 407–09.

⁵³ *United States v. California*, 332 U.S. 19, 46 (1947).

⁵⁴ *Id.* at 30.

⁵⁵ *Id.* at 23; see also *Pollard's Lessee*, 44 U.S. at 223.

each nation owned a three-mile belt along its borders.”⁵⁶ Instead, “acquisition . . . of the three-mile belt [has] been accomplished by the national Government, [and] protection and control of it has been and is a function of national external sovereignty.”⁵⁷ As a result, the Court ruled that “the Federal Government rather than the state has paramount rights in and power over that belt”⁵⁸

Six years later, however, Congress “restored” title to this three-mile belt to the states in the Submerged Lands Act of 1953.⁵⁹ The Submerged Lands Act defines the states’ jurisdiction and regulatory authority over coastal waters, giving coastal states title to “lands beneath navigable waters.”⁶⁰ Under this Act, states have jurisdiction over:

All lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coastline of each such State and to the boundary line of each such State where in any case, such boundary as it existed at the time such State became a member of the Union, or as heretofore approved by Congress, extends seaward (or into the Gulf of Mexico) beyond three geographical miles⁶¹

Thus, at a minimum, the Submerged Lands Act grants state jurisdiction over coastal waters from a state’s coastline to three miles out to sea.⁶² Exceptions exist if the United States took these “lands beneath navigable waters” by eminent domain proceedings, purchase, or gift, or if the United States expressly retained the lands when the state entered the Union.⁶³ States have also brought claims for jurisdiction even farther out to sea,⁶⁴ such that Florida and Texas have consequently acquired jurisdiction extending three marine leagues into the Gulf of Mexico.

Nevertheless, although the federal government generally renounced all of its interests in the three-mile belt, it retained “all its navigational servitude and rights in and power of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs

⁵⁶ *California*, 332 U.S. at 32.

⁵⁷ *Id.* at 34.

⁵⁸ *Id.* at 38–39.

⁵⁹ 43 U.S.C. §§ 1301–1303, 1311–1315 (1994).

⁶⁰ *Id.* § 1311(a).

⁶¹ *Id.* § 1301(a)(2).

⁶² *See id.*

⁶³ *Id.* § 1313(a).

⁶⁴ *See id.* § 1301(a)(2).

...⁶⁵ As a result, the federal government continues to use these powers to affect and influence activities within the coastal zone. For example, the federal government currently exercises its authority over navigation in the three-mile zone through the Rivers and Harbors Act, which prohibits construction in or obstruction of navigable waters absent congressional consent or a permit from the Army Corps of Engineers.⁶⁶ In the Coastal Zone Management Act, Congress provided financial incentives to states to encourage them to enact comprehensive programs to manage both the land and water portions of the coastal zone,⁶⁷ which extend “seaward to the outer limit” of the United States’ territorial sea,⁶⁸ or to three miles offshore.⁶⁹

The Supreme Court has also continued to uphold federal supremacy in ocean and coastal waters, even within the three-mile belt over which states have title.⁷⁰ For example, when the city of Nome, Alaska applied to the Army Corps of Engineers for a permit under the Rivers and Harbors Act to build its port facilities, the Corps effectively required the State of Alaska to “waive any future claims pursuant to the Submerged Lands Act . . . that might arise from a seaward expansion of Alaska’s coastline caused by the building of these facilities.”⁷¹ In response to Alaska’s protest, the Supreme Court held in favor of the federal government, concluding that it was “making no effort to alter the existing rights of a State to sovereignty over submerged lands within three miles of the coastline” but rather was “determin[ing] whether an artificial addition to the coastline [would] increase the State’s control over submerged lands to the detriment of the United States’ legitimate interests.”⁷² Similarly, in 1999, the Supreme Court held that federal statutes governing oil tankers preempted state regulations because the state had regulated “in an area where the federal interest has been manifest since the beginning of our Republic and is now well established.”⁷³

In addition, pursuant to international law, the United States has steadily increased the federal government’s jurisdiction, extending it

⁶⁵ 43 U.S.C. § 1314(a).

⁶⁶ See 33 U.S.C. §§ 401, 403 (1994).

⁶⁷ 16 U.S.C. § 1451 (1994).

⁶⁸ *Id.* § 1453(1).

⁶⁹ See 43 U.S.C. § 1301(a)(2).

⁷⁰ See, e.g., *United States v. Alaska*, 503 U.S. 569 (1992).

⁷¹ *Id.* at 572–73.

⁷² *Id.* at 585–86.

⁷³ *United States v. Locke*, 529 U.S. 89, 99 (1999). The Court found that the State of Washington’s regulations concerning “general navigation watch procedures, English language skills, training, and casualty reporting [were] pre-empted.” *Id.* at 116.

seaward.⁷⁴ Until the mid-twentieth century, international law recognized national jurisdiction over ocean waters only to the three-mile limit—that is, only through the zone that the U.S. Congress, through the Submerged Lands Act, eventually gave to states.⁷⁵ Then, “[i]n 1945, President Truman claimed for the United States jurisdiction and control over the natural resources of the continental shelves off U.S. coasts,” a claim to “ownership rights to resources under the high seas beyond, often far beyond, the outer edge of [the United States’] three-mile territorial sea.”⁷⁶ At the same time, President Truman also claimed for the United States the right “to set conservation rules for its own citizens and vessels fishing in the high seas outside U.S. territorial seas”⁷⁷

The international community essentially ratified President Truman’s pronouncements via four treaties adopted at the 1958 United Nations Convention on the Law of the Sea (UNCLOS I). In particular, the Convention on the Territorial Sea and the Contiguous Zone authorized coastal nations to claim not only a territorial sea but also a contiguous zone beyond the territorial sea stretching up to twelve miles out to sea.⁷⁸ Within this contiguous zone, a coastal nation could “exercise enforcement jurisdiction to prevent and punish violations of its customs, fiscal, immigrations, and sanitary laws applicable to its territory or territorial sea.”⁷⁹ Moreover, the Convention on the Continental Shelf gave a coastal nation “the exclusive right to explore the continental shelf and to exploit its resources,” with the continental shelf extending legally to the 200-meter isobath.⁸⁰

Coastal nation jurisdiction expanded again in the 1982 United Nations Convention on the Law of the Sea (UNCLOS III), which went into effect in 1994.⁸¹ Under UNCLOS III, signatory nations can claim a 12-mile-wide territorial sea, a 24-mile-wide contiguous zone, and a 200-mile-wide exclusive economic zone (EEZ).⁸² The United States has not ratified UNCLOS III, but it has asserted the same jurisdictional claims through statute, presidential declarations, and custom-

⁷⁴ See JOSEPH J. KALO ET AL., COASTAL AND OCEAN LAW: CASES AND MATERIALS 322 (1999).

⁷⁵ *Id.*

⁷⁶ *Id.* at 318.

⁷⁷ *Id.* at 324.

⁷⁸ *Id.* at 328.

⁷⁹ *Id.*

⁸⁰ KALO ET AL., *supra* note 74, at 329.

⁸¹ *Id.* at 333, 337.

⁸² See *id.* at 341 fig.4-3.

ary international law.⁸³ Thus, in 1976, Congress “passed the Magnuson-Stevens Fishery Conservation and Management Act, which established a 200-mile exclusive fishing zone for the United States . . . and effectively ensured that 200-mile zones would not only be part of any future law of the sea treaty but would also be accepted in customary international law within a few years.”⁸⁴ In 1983, President Reagan proclaimed for the United States a 200-mile EEZ for all purposes.⁸⁵ He then extended the United States’ territorial sea to twelve miles in 1988,⁸⁶ and President Clinton proclaimed a 24-mile wide contiguous zone in 1999.⁸⁷

Therefore, the federal government currently exercises jurisdiction over ocean waters from three to 200 miles off the United States’ coast. Moreover, while states have title to the lands beneath waters in the 0-to-3-mile zone, the federal government’s reservations of authority in the Submerged Lands Act and the Supreme Court’s repeated declarations of federal power over the entire ocean have resulted in a strong federal presence in that 3-mile belt as well.⁸⁸ These jurisdictional boundaries and overlaps inform the definitions within and regulatory structure of the federal Clean Water Act.⁸⁹

II. THE CLEAN WATER ACT

A. *Discharges of Pollutants, NPDES Permitting, and State and Federal Regulatory Authority*

Congress enacted the Federal Water Pollution Control Act, later known as the Clean Water Act (CWA),⁹⁰ to “restore and maintain” the quality of our national waters.⁹¹ The core of the CWA’s water quality regulatory scheme is section 301(a), which prohibits “any person”

⁸³ See *id.* at 333, 336–37, 341; see also Magnuson-Stevens Fishery Conservation and Management Act, Pub. L. No. 94–265, §§ 3(11), 101, 90 Stat. 331 (1976) (amended 1996) (current version at 16 U.S.C. § 1801 (2000)).

⁸⁴ KALO ET AL., *supra* note 74, at 336; see also Magnuson-Stevens Fishery Conservation and Management Act, §§ 3(11), 101.

⁸⁵ Exclusive Economic Zone of the United States of America, Proclamation No. 5030, 48 Fed. Reg. 10,605 (March 14, 1983).

⁸⁶ Territorial Sea of the United States of America, Proclamation No. 5928, 54 Fed. Reg. 777 (Jan. 9, 1989).

⁸⁷ Contiguous Zone of the United States, Proclamation No. 7219, 64 Fed. Reg. 48,701 (Sept. 8, 1999).

⁸⁸ See *supra* notes 66–69, 71–74 and accompanying text.

⁸⁹ See 33 U.S.C. § 1251 (1994).

⁹⁰ *Id.*

⁹¹ *Id.* § 1251(a).

from discharging a pollutant except as allowed by the Act.⁹² A “discharge of a pollutant” is “(A) any addition of a pollutant into navigable waters from any point source, [or] (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.”⁹³ The CWA defines a “point source” as:

any discernable, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.⁹⁴

“Pollutant” is a similarly broad term and includes almost anything added to water, including heat.⁹⁵

Thus, as a result of the CWA’s definitions, the section 301 prohibition applies to almost anyone adding almost anything through a human-controlled source to the navigable waters, the contiguous zone, or the ocean.⁹⁶ The definitions of these types of waters further emphasize the broad reach of the Act and its division of jurisdictional authority between the state and federal governments.⁹⁷ Under the CWA, the “contiguous zone” is “the entire zone established . . . [under] the Convention of the Territorial Sea and the Contiguous Zone,”⁹⁸—a reference to the twelve-mile-wide contiguous zone established in UNCLOS I.⁹⁹ Although international law and the United States have both expanded allowable national contiguous zones, Congress has not amended the CWA to incorporate these broader definitions. The “ocean,” however, is defined in the CWA as “any portion of the high seas beyond the contiguous zone,”¹⁰⁰ an area encompassing both the EEZ located 12 to 200 miles seaward and the high seas beyond U.S. jurisdiction.¹⁰¹ As a result, because the CWA prohib-

⁹² *Id.* § 1311(a).

⁹³ *Id.* § 1362(12).

⁹⁴ *Id.* § 1362(14).

⁹⁵ 33 U.S.C. § 1362(6).

⁹⁶ *See id.* § 1362.

⁹⁷ *See id.* §§ 1362(7), 1362(9)–(10).

⁹⁸ *Id.* § 1362(9).

⁹⁹ Although both international and U.S. laws have expanded the area of allowable national contiguous zones, Congress has not amended the CWA to incorporate these broader definitions.

¹⁰⁰ 33 U.S.C. § 1362(10).

¹⁰¹ *See KALO ET AL.*, *supra* note 74, at 341.

its the “discharge of pollutants” into the “ocean,”¹⁰² Congress has effectively expanded CWA jurisdiction seaward to 200 miles.

“Navigable waters,” on the other hand, are “the waters of the United States, including the territorial seas.”¹⁰³ The “territorial seas,” within the meaning of the CWA, are “the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending a distance of three miles.”¹⁰⁴ In other words, “territorial seas” constitute the three-mile belt that states control pursuant to the Submerged Lands Act.¹⁰⁵ While the CWA does not explicitly define “waters of the United States,” the Act’s delineation of these various types of waters suggests that they must comprise the country’s *internal* waters, such as freshwater lakes and rivers.¹⁰⁶ Both EPA and the Army Corps of Engineers, which administer the CWA, have issued regulations consistent with this view.¹⁰⁷

The principal way for a point source to discharge a pollutant and still comply with the CWA is through the Act’s National Pollutant Discharge Elimination System (NPDES) permit program.¹⁰⁸ Any discharge of a pollutant not in compliance with the conditions or limitations of a NPDES permit is unlawful.¹⁰⁹ Moreover, to establish a CWA violation, the government need only prove that the permittee violated the terms and conditions of its NPDES permit.¹¹⁰

Under section 402, the EPA Administrator has the initial authority to issue NPDES permits for all discharges of pollutants.¹¹¹ As such,

¹⁰² See 33 U.S.C. § 1362(12).

¹⁰³ *Id.* § 1362(7).

¹⁰⁴ *Id.* § 1362(8).

¹⁰⁵ See *id.*; *United States v. California*, 332 U.S. 19, 57 (1947).

¹⁰⁶ See 33 U.S.C. § 1362.

¹⁰⁷ See Guidelines for Specification of Disposal Sites for Dredged or Fill Material, 40 C.F.R. § 230.3(s) (1999); Definitions of Waters of the United States, 33 C.F.R. § 328.3(a) (1999). The Supreme Court recently called the full scope of these regulations into question, indicating that the scope of federal regulatory authority under the CWA for internal waters is limited to the federal government’s “traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made” and the wetlands adjacent to such waters. See *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 172, 175–76 (2001).

¹⁰⁸ 33 U.S.C. § 1342.

¹⁰⁹ *Id.* § 1311(a).

¹¹⁰ *Id.* § 1319(b), (d).

¹¹¹ *Id.* § 1342(a)(1).

EPA's NPDES permitting authority extends to all waters that the Act covers, whether internal, coastal, or oceanic.¹¹²

Nevertheless, the CWA also allows states to acquire NPDES permitting authority if the state can demonstrate to EPA that state laws provide adequate authority for carrying out the permitting program in compliance with federal law.¹¹³ Such state programs, however, are more limited in scope than the federal program, because a state can only issue NPDES permits "for discharges into navigable waters within its jurisdiction"¹¹⁴ Given the Act's definition of "navigable waters," a state NPDES program is restricted to the state's internal waters and statutory territorial sea (i.e., the three-mile band of waters off its coast).¹¹⁵ Even if all coastal states were to acquire NPDES permitting authority, therefore, EPA would still retain exclusive authority to issue NPDES permits in the contiguous zone and in the parts of the ocean under United States regulatory jurisdiction.¹¹⁶

Moreover, despite any state-acquired authority, EPA retains final authority regarding NPDES permitting even for coastal and internal waters.¹¹⁷ EPA remains involved in the permitting process even after a state acquires permitting authority because EPA receives a copy of each permit that the state issues and may object to any state-issued permit.¹¹⁸ In addition, EPA retains enforcement authority against any discharger, even if the discharger's permit came from a state.¹¹⁹ EPA also has a statutory duty to inform a state when that "state is not administering [an approved NPDES program] in accordance with requirements of this section,"¹²⁰ and EPA can withdraw its program approval if a state does not correct its administration problems.¹²¹ Each permit is for a fixed term not to exceed five years.¹²² Therefore, EPA can reexamine each application at the end of the permit term as

¹¹² See *id.* § 1362(12) (applying "discharge of a pollutant" to navigable waters, the contiguous zone, and the ocean).

¹¹³ *Id.* § 1342(b).

¹¹⁴ 33 U.S.C. § 1342(b).

¹¹⁵ See *Natural Res. Def. Council v. EPA*, 863 F.2d 1420, 1435 (9th Cir. 1988) (holding that state jurisdiction and "navigable waters include[] only those waters *landward* from the outer boundary of the territorial seas."); *Pac. Legal Found. v. Costle*, 586 F.2d 650, 655-56 (9th Cir. 1978) (relying on the CWA's definitions to determine that state NPDES permitting authority extends only to the seaward limit of the territorial sea).

¹¹⁶ *Costle*, 586 F.2d at 655-56.

¹¹⁷ See 33 U.S.C. § 1342.

¹¹⁸ *Id.* § 1342(d)(1)-(2).

¹¹⁹ *Id.* § 1342(i).

¹²⁰ *Id.* § 1342(c)(3).

¹²¹ *Id.*

¹²² *Id.* § 1342(b).

well.¹²³ Finally, under section 309 of the Act, EPA can step in and pursue enforcement actions if a state fails to enforce permit conditions itself.¹²⁴

B. *Components of NPDES Permitting*

The exact terms and conditions of any NPDES permit are established by applying three types of standards to the discharge at issue: effluent limitations, water quality standards, and ocean discharge criteria.¹²⁵ These standards differ in how they are established, who establishes them, their particular regulatory goals, and exactly when and where they apply.

1. Effluent Limitations

Most of the specific NPDES permit requirements derive from effluent limitations, which the CWA defines as:

any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.¹²⁶

Effluent limitations are technology-based standards, which means that they establish numerical limits for categories of dischargers based on the pollution control technology available to control pollutant discharges.¹²⁷ EPA has the initial or primary authority under the CWA to set effluent limitations for various categories of point sources.¹²⁸

Because the definition of “effluent limitation” refers to navigable waters, the contiguous zone, and the ocean,¹²⁹ and because EPA otherwise has general effluent limitation setting authority,¹³⁰ EPA has the

¹²³ 33 U.S.C. § 1342(b).

¹²⁴ *Id.* § 1319(a).

¹²⁵ *See id.* § 1342.

¹²⁶ *Id.* § 1362(11).

¹²⁷ *Id.* § 1311(b)(1). Initially, Congress required effluent limitations based on “the best practicable control technology currently available.” *Id.* § 1311(b)(1)(A). Congress followed this provision with an interim standard of “best conventional pollution control technology.” *Id.* § 1311(b)(2)(E). Eventually, discharges of pollutants should be subject to effluent limitations based on “the best available technology economically achievable” for each category or class of point source. *Id.* § 1311(b)(2)(A).

¹²⁸ 33 U.S.C. § 1362(11).

¹²⁹ *Id.*

¹³⁰ *See id.* § 1342.

statutory authority to set effluent limitations for discharges from point sources into ocean waters. At times, however, effluent limitations may be insufficient to protect water quality, public health, or a balanced population of fish and wildlife. In such circumstances, EPA must revise its effluent limitations so that they will achieve water quality standards¹³¹—the second requirement governing the terms of a NPDES permit.

2. Water Quality Standards

Effluent limitations are not the only standards for protecting water quality. Section 303 of the CWA requires each state to protect its water quality by setting water quality standards for the waters within its borders.¹³² EPA defines water quality standards as:

provisions of [s]tate or [f]ederal law which consist of a designated use or uses for the waters of the United States and water quality criteria for such waters based upon such uses. Water quality standards are to protect the public health or welfare, enhance the quality of water and serve the purposes of the Act.¹³³

EPA's regulations for the CWA provide that "[a] water quality standard defines the water quality goals of a water body, or portion thereof, by designating the use or uses to be made of the water and by setting criteria necessary to protect the uses."¹³⁴ Water quality standards, therefore, focus on the overall water quality of a particular water body, unlike effluent limitations, which focus on particular kinds of dischargers and the pollutants they discharge.

Water quality standards raise two important issues: how much power do states have to set the standards; and when can or must EPA intervene in the process of setting standards. As written, the CWA gives states the primary authority for setting water quality standards.¹³⁵ Nevertheless, EPA must set water quality standards for a state if the state fails to submit water quality standards within the time frame that the Act specifies or if EPA determines that a state-submitted water quality standard is not consistent with the applicable requirements of

¹³¹ *Id.* § 1312.

¹³² *Id.* § 1313(a) (3) (C).

¹³³ Water Quality Standards, 40 C.F.R. § 131.3(b) (i) (2000).

¹³⁴ *Id.* § 130.3.

¹³⁵ *See* 33 U.S.C. § 1313(a) (discussing the various ways in which state-set water quality standards could remain or come into effect, and requiring states that had not set water quality standards by the Act's effective date to do so).

the CWA.¹³⁶ Thus, EPA has an independent duty to ensure that state water quality standards meet the CWA's requirements. Moreover, the CWA does not allow EPA to defer to the states on this issue.¹³⁷

Most water quality standards consist of two parts: (1) designated uses, and (2) water quality criteria. To adopt water quality standards, states must first classify the uses of the water to be protected. These designations are uses, such as swimming or fishing, for which the water body is either used or approved for that use. The state then must determine the level of water quality necessary to protect those identified uses. These criteria are numerical or narrative indicia that establish the water quality necessary to support the designated uses.

Water quality standards, therefore, establish the overall water quality goal for a particular water body or water segment. Moreover, EPA must adjust effluent limitations to achieve the water quality standards.¹³⁸ As a result, because water quality standards are the "bottom line" for protecting water quality, the setting of water quality standards ultimately determines the final limits for discharges and permitting.¹³⁹ For example, in *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, the Supreme Court held that a state may set minimum flow requirements to enforce a designated use identified in a state water quality standard.¹⁴⁰

Water quality standards may affect point sources in other ways as well. For example, under section 303(d) of the CWA, states must identify waters within their boundaries for which the effluent limitations "are not stringent enough to implement any water quality standard applicable to such waters"¹⁴¹ and then establish a priority list for those waters.¹⁴² For each water segment listed, the state or EPA must change the NPDES permit limits and effluent limitations to ensure that the water quality standards will be achieved.¹⁴³

State authority to set water quality standards, however, is limited geographically.¹⁴⁴ When the current version of the CWA took effect in 1972,

¹³⁶ *Id.* § 1313(a)(3)(C).

¹³⁷ *Id.* § 1313(c).

¹³⁸ *See id.* § 1313(d).

¹³⁹ *See id.*

¹⁴⁰ 511 U.S. 700, 723 (1994).

¹⁴¹ 33 U.S.C. § 1313(d)(1)(A).

¹⁴² *See id.*

¹⁴³ *Id.* § 1313(d)(4)(B).

¹⁴⁴ *See, e.g., id.* § 1313(a)(1)-(2).

any water quality standard applicable to *interstate* waters which was adopted by any State and submitted to, and approved by, or is awaiting approval by, the Administrator . . . [was to] remain in effect unless the Administrator determined that such standard [was] not consistent with the applicable requirements of this Act¹⁴⁵

Moreover, all states that had instituted state-based *intrastate* water quality standards prior to October 18, 1972, were required to submit those water quality standards to the EPA Administrator within thirty days.¹⁴⁶ If the state had done neither, however, it only had to adopt water quality standards for *intrastate* waters and then submit those standards to the EPA Administrator within 180 days.¹⁴⁷ According to the CWA, if a state failed to submit water quality standards for *intrastate* waters, or if those water quality standards were inconsistent with the Act, then EPA would promulgate water quality standards for the state.¹⁴⁸

3. Ocean Discharge Criteria

Section 403 of the CWA, entitled “Ocean Discharge Criteria,” sets forth the requirements for NPDES permits governing discharges into all ocean waters. Under this section:

No permit under section 1342 of this title for a discharge into the territorial sea, the waters of the contiguous zone, or the oceans shall be issued after promulgation of the guidelines established under section (c) of this section, except in compliance with such guidelines.¹⁴⁹

Thus, section 403(a) directly applies to all three ocean regions defined in the CWA—the territorial sea, the contiguous zone, and the ocean.

Section 403 establishes special requirements for point source permits for discharges into these zones.¹⁵⁰ Specifically, section 403(c)(1) states that “[t]he Administrator shall . . . promulgate guidelines for determining the degradation of waters of the territorial seas, the contiguous zone and the oceans”¹⁵¹ All NPDES permits for

¹⁴⁵ *Id.* § 1313(a)(1) (emphasis added).

¹⁴⁶ *Id.* § 1313(a)(2) (emphasis added).

¹⁴⁷ 33 U.S.C. § 1313(a)(3)(A) (emphasis added).

¹⁴⁸ *Id.* § 1313(a)(3)(C)–(b) (emphasis added).

¹⁴⁹ *Id.* § 1343(a).

¹⁵⁰ *Id.* § 1343(c).

¹⁵¹ *Id.*

discharges into the territorial sea, the contiguous zone, and the ocean must comply with these guidelines.¹⁵² Furthermore, the legislative history of section 403 illustrates that prior to issuing permits, EPA was “required to establish guidelines . . . on the effect of disposal of pollutants on human health and welfare, on marine life, and on recreational and economic values, as well as guidelines for determining the persistence of the pollutant and other possible locations for its disposal.”¹⁵³

In “establishing guidelines on the effect of disposal,” EPA weighs a number of factors while examining how certain amounts of disposal would affect the ocean waters.¹⁵⁴ These factors, listed in section 403, include:

- (A) the effect of disposal of pollutants on human health or welfare, including but not limited to plankton, fish, shellfish, wildlife, shorelines, and beaches;
- (B) the effect of disposal of pollutants on marine life including the transfer, concentration, and dispersal of pollutants or their byproducts through biological, physical, and chemical processes; changes in marine ecosystem diversity, productivity, and stability; and species and community population changes;
- (C) the effect of disposal of pollutants on esthetic, recreation, and economic values;
- (D) the persistence and permanence of the effects of disposal of pollutants;
- (E) the effect of the disposal at varying rates, of particular volumes and concentrations of pollutants;
- (F) other possible locations and methods of disposal or recycling of pollutants including land-based alternatives; and
- (G) the effect on alternate uses of the oceans, such as mineral exploitation and scientific study.¹⁵⁵

Because section 403 applies to discharges into “territorial seas,” which are part of the “navigable waters,” ocean discharge criteria can apply to state-issued as well as federally-issued NPDES permits.¹⁵⁶ EPA, however, may not waive its review of state-issued NPDES permits for discharges into the territorial sea like it can for other state-issued

¹⁵² *Id.* § 1343(a).

¹⁵³ 1972 U.S.C.C.A.N. 3818 (emphasis added)

¹⁵⁴ 33 U.S.C. § 1343(c).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* §§ 1343(a), 1362(7).

NPDES permits.¹⁵⁷ Thus, even if the coastal state has acquired NPDES permitting authority, both the state regulatory agencies and the federal government review permits for discharges into the territorial sea.

Congress included the ocean discharge criteria requirements in the 1972 enactment of the CWA, but their promulgation was not smooth. In 1973, "EPA promulgated combined regulations implementing section 102(a) of the Marine Protection, Research, and Sanctuaries Act and section 403(c) of the CWA. The primary focus of these regulations was on the ocean disposal of waste material . . . by dumping from moving vessels."¹⁵⁸ These regulations, however, proved "unworkable" as ocean discharge criteria, and EPA withdrew them.¹⁵⁹ In 1979, the Pacific Legal Foundation sued EPA, attempting to force the agency to promulgate new ocean discharge criteria, and the court ordered such promulgation.¹⁶⁰

In response to this court order, EPA published the existing ocean discharge criteria on October 3, 1980,¹⁶¹ and has not amended them since. These regulations acknowledge that the ocean discharge criteria are simply "guidelines for the issuance of National Pollutant Discharge Elimination System (NPDES) permits for the discharge of pollutants from a point source into the territorial seas, the contiguous zone, and the oceans."¹⁶² Applicants for NPDES permits who propose to discharge into these waters must submit complete chemical, biochemical, and ecological analyses of their proposed discharges.¹⁶³ This submission must also contain an "[a]nalysis of the location where pollutants are sought to be discharged, including the biological community and the physical description of the discharge facility" and an "[e]valuation of the available alternatives to the discharge"¹⁶⁴

Based on the submitted analyses, EPA must determine whether the proposed discharge will cause an "unreasonable degradation of the marine environment,"¹⁶⁵ which the regulations define as:

¹⁵⁷ Compare *id.* § 1343(b) (disallowing EPA to waive its review of state-issued permits when ocean discharge criteria apply) with *id.* § 1342(d)–(e) (allowing EPA to waive notification and review requirements for state-issued NPDES permits in general).

¹⁵⁸ Ocean Discharge Criteria, 45 Fed. Reg. 65,942, 65,942 (proposed Oct. 3, 1980) (codified at 40 C.F.R. part 125).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*; see *Legal Found v. Costle*, 586 F.2d 650, 655–56 (9th Cir. 1978).

¹⁶¹ Ocean Discharge Criteria, 40 C.F.R. §§ 125.120–.124 (2001).

¹⁶² *Id.* § 125.120.

¹⁶³ See *id.* § 125.124.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* § 125.123(a), (b), (c).

- (1) Significant adverse changes in ecosystem diversity, productivity and stability of the biological community within the area of discharge and surrounding biological communities,
- (2) Threat to human health through direct exposure to pollutants or through consumption of exposed aquatic organisms, or
- (3) Loss of esthetic, recreational, scientific or economic values which is unreasonable in relation to the benefit derived from the discharge.¹⁶⁶

EPA then assesses “unreasonable degradation of the marine environment” on the basis of ten factors,¹⁶⁷ including the marine water quality criteria that the agency published pursuant to section 304(a)(1).¹⁶⁸ However, if a pollutant discharge complies with state-issued water quality standards, there is an automatic presumption of no unreasonable degradation of the marine environment “for any specific pollutants or conditions specified . . . in the standard.”¹⁶⁹

¹⁶⁶ *Id.* § 125.121(e).

¹⁶⁷ Ocean Discharge Criteria, 40 C.F.R. § 125.122(a). Specifically, the ten factors are:

- (1) The quantities, composition and potential for bioaccumulation or persistence of the pollutants to be discharged;
- (2) The potential transport of such pollutants by biological, physical, or chemical processes;
- (3) The composition and vulnerability of the biological communities which may be exposed to such pollutants, including the presence of unique species or communities of species, the presence of species identified as endangered or threatened pursuant to the Endangered Species Act, or the presence of those species critical to the structure or function of the ecosystem, such as those important for the food chain;
- (4) The importance of the receiving water area to the surrounding biological community, including the presence of spawning sites, nursery/forage areas, migratory pathways, or areas necessary for other functions or critical stages in the life cycle of an organism;
- (5) The existence of special aquatic sites including, but not limited to marine sanctuaries and refuges, parks, national and historic monuments, national seashores, wilderness areas and coral reefs;
- (6) The potential impacts on human health through direct and indirect pathways;
- (7) Existing or potential recreational and commercial fishing, including finfishing and shellfishing;
- (8) Any applicable requirements of an approved Coastal Zone Management plan;
- (9) Such other factors relating to the discharge as may be appropriate;
- (10) Marine water quality criteria developed pursuant to section 304(a)(1).

Id.

¹⁶⁸ *Id.* § 125.122(a)(10).

¹⁶⁹ *Id.* § 125.122(b).

In any case where EPA determines that the proposed discharge “will not cause unreasonable degradation of the marine environment after application of any necessary conditions,” the NPDES permit may issue.¹⁷⁰ Conversely, if EPA finds that the discharge *will* cause unreasonable degradation even after application of all possible conditions, the NPDES permit cannot be issued.¹⁷¹ Finally, if an applicant provides insufficient analytical information such that EPA is unable to discern whether unreasonable degradation will occur, then no discharge of pollutants will be allowed unless the agency makes the following three determinations:

- (1) Such discharge will not cause irreparable harm to the marine environment during the period in which monitoring is undertaken, and
- (2) There are no reasonable alternatives to the on-site disposal of these materials, and
- (3) The discharge will be in compliance with all permit conditions¹⁷²

If these three conditions are met for a particular pollutant, then the discharge of that pollutant will be permitted.¹⁷³

C. *Ocean Discharge Criteria and Water Quality Standards Compared*

As discussed, many of the CWA’s additional water quality protections, such as section 302 water quality-based effluent limitations,¹⁷⁴ section 401 certifications,¹⁷⁵ and TMDLs,¹⁷⁶ depend upon the existence of water quality standards. In the territorial sea, if the relevant state sets water quality standards, all of these additional protections also apply. In the contiguous zone and the ocean, however, where water quality standards do not exist, these protections, under the plain language of the statute, do not apply.

Two issues thus emerge regarding the contiguous zone and the ocean. First, can ocean discharge criteria be considered the regulatory equivalent of water quality standards such that the violation of

¹⁷⁰ *Id.* § 125.123(a).

¹⁷¹ *Id.* § 125.123(b).

¹⁷² *Id.* § 125.123(c). The regulations define “irreparable harm” to be “significant undesirable effects occurring after the date of permit issuance which will not be reversed after cessation or modification of the discharge.” *Id.* § 125.121(a).

¹⁷³ *See id.*

¹⁷⁴ *See supra* section II.B.

¹⁷⁵ *See supra* section II.B.

¹⁷⁶ *See supra* section II.B.

those criteria will trigger the other protections of the CWA? Second, if not, can EPA go ahead and set water quality standards for the contiguous zone and the ocean so that these other provisions will apply?

Regarding the first issue, the CWA is not clear as to how ocean discharge criteria relate to water quality standards and effluent limitations. Arguably, ocean discharge criteria are the equivalent of water quality standards applied to the outer ocean zones. The factors listed in section 403, which guide EPA's assessment of ocean discharges, directly parallel the designated use aspect of water quality standards in that the factors specify the uses of the contiguous zone and the ocean that EPA must protect.¹⁷⁷ Moreover, in its regulatory definitions, EPA has emphasized the importance of use protection for water quality standards by defining "water quality standards" as "provisions of State or Federal law which consist of a designated use or uses for waters of the United States and water quality criteria for such water based upon such uses."¹⁷⁸ This definition shows that ocean discharge criteria are essentially the functional equivalent of water quality standards because both protect the *uses* of the water through use-related criteria. For ocean discharge criteria, however, Congress enumerated the designated uses and then left it up to EPA to establish the criteria for ocean water quality necessary to achieve and maintain those uses.

Further, EPA regulations state that discharges found to be in compliance with section 303 water quality standards will be presumed to also be in compliance with section 403 ocean discharge criteria.¹⁷⁹ As such, EPA itself has equated ocean discharge criteria with water quality standards, a fact it emphasized when promulgating rules in 1980: "the similarity between the objectives and requirements of [state water quality standards] and those of section 403 warrants a presumption that discharges in compliance with these [standards] also satisfy section 403."¹⁸⁰ Specifically, "State water quality standards established pursuant to section 303 of the [CWA] are designed to preserve the quality of waters under State jurisdiction, *including the territorial seas*, and compliance with these standards should ensure protection of the uses for which the waters are designated with respect to pollutants for which standards have been established."

EPA's regulations also currently refer to the section 304(a) water quality criteria for water quality standards as guiding factors to be

¹⁷⁷ 33 U.S.C. § 1343(c)(1) (1994).

¹⁷⁸ Ocean Discharge Criteria, 40 C.F.R. § 131.3(i).

¹⁷⁹ *Id.* § 125.122(b).

¹⁸⁰ Ocean Discharge Criteria, 45 Fed. Reg. 65,943 (proposed Oct. 3, 1980) (codified at 40 C.F.R. part 125).

considered prior to issuing permits for discharges into ocean and coastal waters.¹⁸¹ In EPA's later proposed revisions, water quality criteria played a more definitive role, such that "it was to be assumed that the criteria would be applied unless the permit authority specifically demonstrates that they should not be applied."¹⁸² Thus, for twenty years EPA has tied ocean discharge criteria directly to water quality standards.

If there were a perfect division of regulatory authority, such that the states set water quality standards for navigable waters and EPA established ocean discharge criteria for all coastal and ocean waters, then the argument that ocean discharge criteria should be treated as water quality standards would be particularly strong, given the various connections that can be inferred from the language in EPA's regulations. The problem with this argument, however, is the regulation of the territorial sea. Because the territorial sea is part of the navigable waters, the states (or EPA, if the states fail to comply) must set water quality standards for the territorial sea. Section 403, however, specifically requires ocean discharge criteria for the territorial sea as well. Therefore, for discharges into the territorial sea, *both* sets of requirements should apply, suggesting that they cannot be treated as regulatory equivalents. Moreover, despite its linking of ocean discharge criteria to water quality standards, EPA has also stated that "ocean discharge criteria apply in addition to the general National Pollutant Discharge Elimination System (NPDES) permit requirements of section 402 and are intended to give added protection to ocean waters."¹⁸³ Thus, permittees subject to section 403 must comply with ocean discharge criteria as well as "other applicable provisions of the Clean Water Act."¹⁸⁴ These other provisions include "applicable technology-based requirements specified by sections 301, 304, or 306 [effluent limitations] and water-quality based limitations specified by sections 303 or 307 [water quality standards]."¹⁸⁵

Therefore, given that both the CWA and EPA distinguish water quality standards from ocean discharge criteria, the two cannot be treated as regulatory equivalents. Moreover, because the TMDL provisions, section 302, and the interstate provisions all refer to "water quality standards" alone, these provisions do not automatically apply in the contiguous zone and the ocean when EPA establishes ocean

¹⁸¹ 40 C.F.R. § 125.122(a)(10).

¹⁸² 65 Fed. Reg. 74,478, 74,608, 74,612 (proposed Nov. 30, 2000).

¹⁸³ *Id.* at 74,612.

¹⁸⁴ 45 Fed. Reg. at 65,944.

¹⁸⁵ *Id.*

discharge criteria for those water bodies. The question that remains is whether EPA's proposed water quality regime for the contiguous zone and the ocean makes these additional protections available.

III. WATER QUALITY PROTECTION FOR MPAS

A. EPA's Proposed MPA Regulation in General

EPA's proposed rule to implement the MPA Executive Order significantly expands the rules governing ocean discharge criteria. The proposed rule would implement three new regulatory emphases: ocean water quality standards; increased protection for coastal and ocean waters; and special ocean sites. Each of these innovations will be discussed in turn.

1. Use of Ocean Water Quality Standards

The first important aspect of the proposed regulations is the "establishment of baseline water quality standards for ocean waters beyond three miles offshore. These waters, designated 'Healthy Ocean Waters,' would be protected by both a narrative statement of desired quality and pollutant-specific numeric criteria."¹⁸⁶ Any new or renewed NPDES permit would have to comply with these new baseline water quality standards.¹⁸⁷ The designated use component of the new standards would be "Healthy Ocean Waters," which would be developed through "pollutant-specific numeric criteria."¹⁸⁸

What is troubling about these water quality standards, however, is that EPA did not propose them as *additions* to the ocean discharge criteria but rather *as* the ocean discharge criteria. Thus, instead of relying on section 303 or other provisions of the CWA for its authority, EPA rests its authority to set ocean water quality standards squarely on section 403:

Section 403(c) of the CWA directs the Administrator to promulgate guidelines for determining degradation of ocean waters. EPA promulgated such guidelines in 1980, but since then, EPA has had a great deal of experience in enhancing water quality based protection for U.S. waters. Particularly in the State water quality standards context, EPA has experience with designated uses, criteria to protect those

¹⁸⁶ EPA OCEAN DISCHARGE CRITERIA REVISIONS, *supra* note 4, at 10.

¹⁸⁷ *Id.* at 11.

¹⁸⁸ *Id.*

uses and antidegradation policies, and has found these to be vital tools to accomplishing the goal of the Act “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” CWA section 101(a). *To that end, EPA believes it is reasonable to interpret section 403 of the Act to enable EPA to establish certain protections analogous to those in State waters for Federal waters. This would include a use designation of all Federal ocean waters as “Healthy Ocean Waters,” establishment of a narrative criterion and certain numeric ocean water quality criteria to protect that use, and establishment of an antidegradation policy to ensure that a review is conducted before any lowering of water quality.*¹⁸⁹

By the EPA’s own admission, therefore, the legitimacy of the new rules will turn on how well they comply with section 403.

In its new rules, EPA proposed to use its section 403 ocean discharge criteria authority to set requirements that are, in all respects, water quality standards. For all “Federal ocean waters, and for any State ocean waters where applicable CWA water quality standards are not in place,” the designated use will be Healthy Ocean Waters.¹⁹⁰ More specifically, such a designation

shall provide for the attainment and maintenance of esthetic and scientific values, provide for recreation in and on the water, support a balanced indigenous population of aquatic life and wildlife (including benthic organisms, fish and shellfish, and other marine organisms), taking into consideration both direct and indirect effects of pollutants, and protect human health.¹⁹¹

The proposed rules also list sixteen specific water quality criteria for Healthy Ocean Waters¹⁹² and establish an antidegradation policy for Healthy Ocean Waters that ensures that when water quality “exceeds levels necessary to support Healthy Ocean Waters,” then better water quality “shall be maintained and protected unless the Director finds, after consulting with the public, that allowing lower water quality is necessary to accommodate important economic or social development.”¹⁹³

¹⁸⁹ *Id.* at 17 (emphasis added).

¹⁹⁰ *Id.* at 119 (proposed 40 C.F.R. § 125.121(e)).

¹⁹¹ *Id.* at 122 (proposed 40 C.F.R. § 125.123(b)(1)).

¹⁹² EPA OCEAN DISCHARGE CRITERIA REVISIONS, *supra* note 4, at 122–23 (proposed 40 C.F.R. § 125.123(b)(2)).

¹⁹³ *Id.* at 124 (proposed 40 C.F.R. § 125.123(b)(5)).

2. Stronger Requirements for Discharges into Ocean and Coastal Waters

The second emphasis of the proposed rules is to “strengthen the requirements for a permit to discharge to ocean waters.”¹⁹⁴ For instance, EPA’s proposed rules would require dischargers to consider alternative disposal sites when requesting permits.¹⁹⁵ Also, the rules would prohibit issuance of discharge permits “unless there is sufficient information to evaluate the impacts of the proposed discharge.”¹⁹⁶ Furthermore, the rules would require that every NPDES permit allowing “a discharge into Healthy Ocean Waters must contain effluent limitations that control each pollutant or pollutant parameter which the Director determines is or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion” of any of the sixteen specific criteria established for these waters.¹⁹⁷

3. Special Ocean Sites

The third and most innovative aspect of the proposed rule is the establishment of Special Ocean Sites (SOSs). “SOSs are specific areas within ocean waters that have significant outstanding ecological, environmental, recreational, scientific, or esthetic value.”¹⁹⁸ EPA views the SOS proposal as filling a gap that currently exists in ocean water quality regulation:

Most programs now being implemented to protect ocean and coastal waters under the Clean Water Act are based on environmental standards that apply equally to all ocean waters, regardless of the relative environmental significance of the waters. There is a growing recognition, however, that some coastal and ocean waters are especially important to the ecological health of the oceans or contain irreplaceable natural features.

¹⁹⁴ *Id.* at 10.

¹⁹⁵ *Id.* at 11.

¹⁹⁶ *Id.*; see also *id.* at 125–27 (proposed 40 C.F.R. § 125.124(a)) (listing the information that must be provided); 128–29 (proposed 40 C.F.R. § 125.124(c)(1) and (3)) (prohibiting NPDES permits if the information provided is insufficient or if an “environmentally preferable alternative” exists).

¹⁹⁷ EPA OCEAN DISCHARGE CRITERIA REVISIONS, *supra* note 4, at 123 (proposed 40 C.F.R. § 125.123(b)(3)).

¹⁹⁸ *Id.* at 20.

Following the land model of the National Park System which has preserved millions of acres of critical habitat for the enjoyment of future generations by setting aside areas of particular ecological integrity and importance, EPA's establishment of the first Special Ocean Sites is a vital step toward protection of unique habitats such as coral reef ecosystems, hydrothermal vent communities, critical habitat as designated under the Endangered Species Act, unique or irreplaceable breeding/spawning/nursery areas, and other areas critical to the life histories of marine organisms, from the potential impacts of pollutant discharges.¹⁹⁹

Therefore, SOSs add an ecosystem focus to ocean discharge criteria.

Once SOSs are designated, "new discharges and significantly expanded existing discharges (20% or greater increase in loadings beyond the current permit limit) into Special Ocean Sites would be prohibited," except by a presidential waiver.²⁰⁰ In addition, "EPA will work with States to designate those SOSs under their jurisdiction (within three miles of shore) as no-discharge zones (NDZ) under section 312 of the Clean Water Act."²⁰¹ Under an NDZ designation, SOSs will be protected from potential environmental impacts related to vessels that discharge sewage.²⁰² Finally, EPA intends the SOSs to qualify as MPAs and to "be considered for inclusion in the national system of MPAs to be established under the [MPA] Executive Order."²⁰³

B. *Ocean Discharge Criteria Under the Proposed Rules*

1. Regulatory Status of the Hybrid Regulations

EPA has assumed authority to issue water quality standards for waters of the ocean and contiguous zone (i.e., from three to 200 miles out to sea), but it has rested that authority on section 403, rather than on section 303.²⁰⁴ Section 403, however, says nothing about water quality standards—only ocean discharge criteria.²⁰⁵ Therefore, any

¹⁹⁹ *Id.* at 37–38.

²⁰⁰ *Id.* at 12; *see also id.* at 128 (proposed 40 C.F.R. § 125.124(c)(2)) (prohibiting a NPDES permit if "[t]he proposed discharge would be a new or significantly expanded discharge to waters of a Special Ocean Site"), 129 (proposed 40 C.F.R. § 125.124(d)(2)) (allowing for a presidential waiver).

²⁰¹ *Id.* at 12.

²⁰² *Id.*

²⁰³ *Id.* at 21–22.

²⁰⁴ 33 U.S.C. § 1343 (1994).

²⁰⁵ *Id.*

requirements that EPA sets under the authority of section 403 must, for regulatory purposes, be deemed to be ocean discharge criteria, no matter how extensively EPA models those ocean discharge criteria on the concept of water quality standards. Furthermore, as EPA has proposed the revisions to the ocean discharge criteria regulations, EPA's hybrid requirements are probably still just ocean discharge criteria—not ocean discharge criteria *and* water quality standards. Indeed, even EPA treats the Healthy Ocean Waters regulations as being “analogous” to water quality standards, not *as* water quality standards.

Nevertheless, given how EPA proposes to actually implement the water quality standards model, the proposed regulations would not meet EPA's duty to set ocean discharge criteria because they fail to establish additional requirements for all of the waters included within the scope of section 403.

2. Violation #1: The EPA Has Not Proposed to Set Ocean Discharge Criteria for All Ocean Waters

Because Congress directs EPA to set ocean discharge criteria for the territorial seas under section 403,²⁰⁶ EPA must set ocean discharge criteria for the state-controlled zone from zero to three miles out to sea. Indeed, EPA itself has always understood that “Section 403 applies to all discharges seaward of the inner boundary of the territorial seas.”²⁰⁷

On the surface, the proposed regulations appear to comport with this requirement. They define “baseline” as “the line of ordinary low water along that portion of the coast which is in direct contact with the open sea, and the line marking the seaward limit of inland waters.”²⁰⁸ “Ocean waters,” in turn, are “the waters seaward of the baseline that are within the jurisdiction of the Clean Water Act.”²⁰⁹ Because the new regulations apply to all ocean waters, EPA's proposed rules acknowledge that ocean discharge criteria indeed apply to *all* ocean and coastal waters—even those within the state-controlled three-mile zone.²¹⁰

Nevertheless, although EPA acknowledges that ocean discharge criteria should apply to all ocean and coastal waters, its proposed rules effectively limit the new ocean discharge criteria and water qual-

²⁰⁶ *Id.*

²⁰⁷ 45 Fed. Reg. at 65,944 (Oct. 3, 1980).

²⁰⁸ EPA OCEAN DISCHARGE CRITERIA REVISIONS, *supra* note 4, at 118 (proposed 40 C.F.R. § 125.121(a)).

²⁰⁹ *Id.* at 119 (proposed 40 C.F.R. § 125.121(b)).

²¹⁰ *Id.*

ity standards almost exclusively to federal waters.²¹¹ Under EPA's proposal,

[I]n State ocean waters (from the baseline to 3 miles offshore) where applicable State, Territorial, authorized Tribal, or Federal CWA water quality standards are in place, those water quality standards would continue to apply. At present EPA believes that all States, Territories and Tribes have applicable water quality standards in place. As a precautionary measure, however, today's proposed rule would establish "Healthy Ocean Waters" (HOW) as the designated use for State ocean waters where applicable CWA water quality standards are not in place, as well as for waters beyond State ocean waters that are within the jurisdiction of the Clean Water Act.²¹²

As proposed, therefore, EPA's rules would *not* set ocean discharge criteria for the territorial sea, as section 403 requires. As a result, EPA's proposal would ignore EPA's duties under section 403.

3. Violation #2: The Proposed Ocean Discharge Criteria Are Not Separate, Additional Requirements Beyond Water Quality Standards

In its proposed rules, EPA continues to assert that ocean discharge criteria "provide for *additional* protection of ocean waters (i.e., waters seaward of the baseline that are within the jurisdiction of the CWA)."²¹³ Thus, at least at one level, EPA seems to still accept that ocean discharge criteria are different requirements from water quality standards. Nevertheless, in its proposed rules, EPA proposes an unusual juxtaposition of water quality standards and ocean discharge criteria.²¹⁴ As has been discussed, ocean discharge criteria have always

²¹¹ *Id.*

²¹² EPA OCEAN DISCHARGE CRITERIA REVISIONS, *supra* note 4, at 19–20; *see also id.* at 120–21 (proposed 40 C.F.R. § 125.122) (distinguishing the requirements for dischargers discharging into "State ocean waters (baseline to 3 miles) where applicable CWA water quality standards are in place" from those for discharges into "State ocean waters (baseline to 3 miles) where applicable CWA water quality standards are NOT in place" and into "Federal ocean waters (beyond 3 miles from the baseline)"); *see id.* at 121 (proposed 40 C.F.R. § 125.123(a)) (stating that "[f]or State ocean waters where applicable State, Territorial, authorized Tribal, or Federal CWA water quality standards are in place, those water quality standards apply.").

²¹³ EPA OCEAN DISCHARGE CRITERIA REVISIONS, *supra* note 4, at 14 (emphasis added).

²¹⁴ *Id.*

paralleled water quality standards in many ways.²¹⁵ By proposing ocean discharge criteria that are actually water quality standards, however, EPA proposes to erase the distinction between the two types of requirements, raising questions as to whether it has in fact fulfilled its section 403 responsibilities.

As discussed earlier, the CWA envisions ocean discharge criteria as separate and additional requirements (i.e., above and beyond effluent limitations and water quality standards) that apply to discharges into the ocean and coastal waters. Consequently, EPA's proposed rules would arguably violate section 403 because EPA has not set the additional "guidelines" that section 403(c) demands. This lack of additional requirements is most obvious in regard to the territorial sea. Under the 1980 regulations, ocean discharge criteria apply to discharges into the territorial sea even though the relevant state also may have set water quality standards for the coastal waters. Thus, the ocean discharge criteria have truly been an additional set of requirements. Under EPA's proposed rules, however, *either* the state water quality standards *or* EPA's new requirements would apply. As a result, although the proposed rules might suffice as ocean discharge criteria for the federal waters where no state water quality standards apply, they fail to provide additional requirements within the territorial sea as section 403 demands.

C. *EPA's Authority to Set Water Quality Standards for Waters
Beyond Three Miles Out to Sea*

EPA has not proposed water quality standards for ocean waters in the regulatory sense because it relies entirely on section 403 for its authority.²¹⁶ Nevertheless, given EPA's view that water quality standards offer the best protection for ocean water quality, the question still remains whether EPA has the authority to set true water quality standards for federal ocean waters.

The Supreme Court has recognized that the federal government exercises extensive and plenary control over the ocean waters.²¹⁷ Thus, Congress could grant authority to EPA to set water quality standards if it chose to do so. Moreover, it is evident that, in section 303, Congress has already given EPA authority to set some water quality standards because EPA has the power to set water quality standards for

²¹⁵ See discussion, *supra* Section II.C.

²¹⁶ See discussion, *supra* Section III.A.1.

²¹⁷ *United States v. California*, 332 U.S. 19, 46 (1947).

state-controlled waters, including the territorial seas, when states fail to do so.²¹⁸

Section 303(a)'s focus on *intrastate* waters²¹⁹ raises several issues regarding water quality standards and ocean waters. First, under the CWA, states can generally acquire control over discharges into the navigable waters (i.e., the internal waters and the 0- to 3-mile territorial sea off state coasts).²²⁰ By focusing on intrastate waters, section 303(a) suggests that water quality standards may be limited to internal waters only.²²¹ However, other sections of the CWA, EPA's practice, and new amendments to the CWA indicate that water quality standards apply throughout the navigable waters, including the territorial seas. For example, Congress has noted that "revised or new water quality standard[s] shall consist of the designated uses of the *navigable waters* involved and the water quality criteria for such waters based upon such uses."²²² Thus, Congress expected water quality standards to apply to all navigable waters. In addition, on October 10, 2000, Congress passed the Beaches Environmental Assessment and Coastal Health (BEACH) Act of 2000, amending section 303(a) to require states to set certain kinds of water quality standards for their coastal waters.²²³ In particular, the BEACH Act required that:

Not later than 42 months after the date of the enactment of this subsection, each State having coastal recreation waters shall adopt and submit to the Administrator water quality criteria and standards for the coastal recreation waters of the State for those pathogens and pathogen indicators for which the Administrator has published criteria under section 304(a).²²⁴

Congress thereby intended for coastal recreation waters, defined in the amendments as "marine coastal waters . . . that are designated under section 303(c) by a State for use for swimming, bathing, surfing, or similar water contact activities,"²²⁵ to be subject to the CWA's scheme for water quality standards. It seems clear, therefore, that Congress intended water quality standards to apply to all navigable

²¹⁸ See 33 U.S.C. § 1313(a)(3)(C), (b)(1) (1994).

²¹⁹ See *id.* § 1313(a).

²²⁰ See *id.*

²²¹ See *id.*

²²² *Id.* § 1313(c)(2)(A) (emphasis added).

²²³ Beaches Environmental Assessment and Coastal Health Act of 2000, Pub. L. No. 106-284, § 2, 114 Stat. 870 (2000).

²²⁴ *Id.*

²²⁵ 33 U.S.C. § 1362(21)(A)(ii).

waters, including the three-mile wide territorial sea, and this is the interpretation that EPA has adopted.²²⁶

Second, section 303(a)'s focus on intrastate waters (or even its expanded focus on the navigable waters) raises the issue of whether EPA must, or even can, set water quality standards for the contiguous zone and the ocean waters. These waters, as noted, are not state waters and are not mentioned in section 303. Other parts of the CWA, however, indicate that EPA has the discretion to set water quality standards for the ocean. For example, in section 304, Congress required the EPA to publish the following:

[C]riteria for water quality accurately reflecting the latest scientific knowledge (A) on the kind and extent of all identifiable effects on health and welfare including, but not limited to, plankton, fish, shellfish, wildlife, plant life, shorelines, beaches, esthetics, and recreation which may be expected from the presence of pollutants in *any body of water*, including ground water; (B) on the concentration and dispersal of pollutants, or their byproducts, through biological, physical, and chemical processes; and (C) on the effects of pollutants on biological community diversity, productivity, and stability, including information on the factors affecting rates of eutrophication and rates of organic and inorganic sedimentation for varying types of receiving waters.²²⁷

Thus, EPA can set water quality criteria, which are components of water quality standards, for any body of water it chooses.

While these "[s]ection 304(a) criteria provide guidance to States and Tribes in adopting water quality standards that ultimately provide a basis for controlling discharges or releases of pollutants,"²²⁸ Congress' broad inclusion of "any" waters suggests that EPA could find that water quality criteria—one component of water quality standards—should be set for ocean waters as well. Indeed, EPA has set water quality criteria for salt water.²²⁹ Moreover, although EPA has thus far viewed these criteria as being applicable for states and tribes when

²²⁶ See Ocean Discharge Criteria, 45 Fed. Reg. 65,492, 65,943 (proposed Oct. 3, 1980) (codified at 40 C.F.R. part 125). "State water quality standards established pursuant to section 303 of the Act are designed to preserve the quality of waters under State jurisdiction, including the territorial seas." *Id.* "State water quality standards do not generally apply beyond the limits of the territorial seas." *Id.* at 65,951.

²²⁷ 33 U.S.C. § 1314(a)(1) (emphasis added).

²²⁸ OFFICE OF WATER, ENVIRONMENTAL PROTECTION AGENCY, NATIONAL RECOMMENDED WATER QUALITY CRITERIA—CORRECTION 1 (April 1999).

²²⁹ See *id.* at 7-19.

setting water quality standards or for EPA when it steps in and sets quality standards for them, nothing in section 304(a) prevents EPA from expanding the use of water quality criteria.²³⁰ Indeed, section 304 orders EPA to publish “information . . . on the factors necessary to restore and maintain the chemical, physical, and biological integrity of all navigable waters, ground waters, *waters of the contiguous zone, and the oceans*”²³¹ when developing the water quality criteria themselves.

Water quality standards also are not conclusively limited to the navigable waters by section 303.²³² Although “[s]tate water quality standards are not generally applicable “beyond the limits of the territorial seas,”²³³ that is because state jurisdiction extends no further than that, not because water quality standards are irrelevant to protecting ocean water quality. States, after all, have adopted water quality standards “for ocean waters within their jurisdiction (waters within three miles of shore).”²³⁴

The best view of section 303, therefore, is that it only regulates the setting of water quality standards for the state-controlled navigable waters and the federal government’s role in setting those standards. It is silent regarding federal regulation of federal waters. In other words, section 303 orders EPA to ensure that water quality standards exist for all the navigable waters, but it leaves EPA with considerable discretion to regulate the ocean waters, in addition to EPA’s authority to establish ocean discharge criteria.

This reading comports both with the broad authority and discretion that EPA generally enjoys in implementing the CWA and with the specific historical and regulatory context in which Congress enacted the 1972 version of the Act. For example, the CWA gives EPA broad regulatory powers. In particular, EPA’s Administrator has the authority to establish such regulations *as are necessary* to carry out his functions” under the CWA.²³⁵ The Administrator’s functions are broad because, “[e]xcept as otherwise expressly provided in [the CWA], the Administrator of the Environmental Protection Agency . . . shall administer [the CWA].”²³⁶ The overall objective of the CWA “is to re-

²³⁰ See generally *id.* at 1–3 (explaining how water quality criteria are to be used by states and tribes).

²³¹ 33 U.S.C. § 1314(a) (2) (1994) (emphasis added).

²³² See *id.* § 1362.

²³³ 45 Fed. Reg. 65,942, 65,951 (Oct. 3, 1980) (emphasis added).

²³⁴ *Id.*

²³⁵ 33 U.S.C. § 1361(a) (emphasis added).

²³⁶ *Id.* § 1251(d).

store and maintain the chemical, physical, and biological integrity of the Nation's waters," and Congress established a national policy that efforts "be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans" ²³⁷ To this end, EPA must "establish national programs for the prevention, reduction, and elimination of pollution," including a specific duty to "establish, equip, and maintain a water quality surveillance system for the purpose of monitoring the quality of the navigable waters and ground waters and the contiguous zone and the oceans" ²³⁸ In addition, EPA has explicit authority to "develop effective and practical processes, methods, and prototype devices for the prevention, reduction, and elimination of pollution." ²³⁹ These broad grants of authority to EPA strongly suggest that, as a matter of pure statutory language, EPA could assert authority to promulgate true water quality standards for federally-controlled ocean waters.

Congressional intent and legislative history also support such authority for EPA. First, section 303 focuses on state promulgation of water quality standards, a holdover from water quality regulation enacted by Congress prior to 1972. As such, congressional targeting of state-controlled "navigable waters" in section 303 was natural and not intended to limit EPA's authority with respect to federally-controlled ocean waters. Indeed, the legislative history from the 1972 amendments to the CWA expressly indicates that Congress was *increasing* the federal government's role by giving EPA authority to set state water quality standards and by linking those water quality standards to the NPDES permit program:

For more than two decades, Federal legislation in the field of water pollution control has been keyed primarily to an important principle of public policy: The States shall lead the national effort to prevent, control and abate water pollution. As a corollary, the Federal role has been limited to support of, and assistance to, the States

From its two-year study of the [prior, State-based] Federal water pollution control program, the Committee concludes that the national effort to abate and control water pollution has been inadequate in every vital aspect

²³⁷ *Id.* § 1251(a)(6).

²³⁸ *Id.* § 1254(a)(5).

²³⁹ *Id.* § 1254(b)(7).

The [new] permit system establishes a direct link between the Federal government and each industrial source of discharge into the navigable waters

The legislation will restore Federal-State balance to the permit system.²⁴⁰

Second, while Congress included the ocean waters in the 1972 CWA, the United States' ocean jurisdiction has expanded dramatically²⁴¹ in the years since, while section 403 has remained unamended. Under prevailing international law in 1972, as delineated in UNCLOS I, the United States could control a narrow territorial sea and a twelve-mile-wide contiguous zone and also had exclusive rights to explore its continental shelf.²⁴² The United States did not claim full rights to the 200-mile wide EEZ until 1983,²⁴³ more than a decade later, and President Reagan did not extend our territorial sea to twelve miles until 1988.²⁴⁴ Congress thus paid less attention to the ocean waters in 1972 than is currently warranted, but it gave EPA broad discretion and authority to resolve emerging water quality problems. EPA has determined in its new proposed rules that water quality standards will improve the water quality of the ocean waters, and nothing in either section 303 or section 403, viewed in their proper historical setting, should prohibit EPA from using the various strands of its CWA authority to enact such standards.

D. *Implications of Ocean Water Quality Standards*

The distinction between ocean discharge criteria and water quality standards is not a trivial one. So long as EPA proposes only water-quality-standard-like ocean discharge criteria, it insulates the oceans from several of the CWA's more far-reaching protections. Even if EPA chooses to promulgate true water quality standards for ocean waters, however, its authority and duty to address other sources of water pollution, such as nonpoint source pollution and discharges into internal waters and territorial seas that affect the ocean waters, will still be questionable.

²⁴⁰ S. REP. NO. 92-414, at 1, 7, 8 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668-69, 3674-75.

²⁴¹ *Supra* notes 76-88 and accompanying text.

²⁴² *Supra* note 79-82 and accompanying text.

²⁴³ *Supra* note 86 and accompanying text.

²⁴⁴ *Supra* note 87 and accompanying text.

1. Point Source Discharges and Water-Quality Based Effluent Limitations

Under section 302 of the CWA, whenever the standard effluent limitations for point source discharges allow discharges that “would interfere with the attainment or maintenance of that water quality in a specific portion of the *navigable waters*,” EPA must adjust effluent limitations to allow such water quality to be achieved.²⁴⁵ By its terms, section 302 applies only to the navigable waters where state water quality standards apply—not to the contiguous zone or the ocean. Therefore, if EPA promulgates true water quality standards for the ocean and contiguous zone, it arguably has no duty under section 302 to adjust effluent limitations to ensure that point sources achieve those standards. Given EPA’s general authority under the CWA and its general authority over effluent limitations, however, it certainly has sufficient discretionary authority to amend effluent limitations to ensure that the new water quality standards will be achieved.

2. Nonpoint Sources

Generally, nonpoint sources are any sources that are not point sources. Nonpoint sources consist of indirect sources of water pollution, such as return flows from irrigation and other farming practices, groundwater extraction, and runoff from urban storm water and other disposal areas, including abandoned surface and underground mines.²⁴⁶ In many areas of the country, pollution from nonpoint sources has become even more serious than discharges from industrial facilities.²⁴⁷ Nonpoint source discharges are often the primary reason why water quality in a state is inadequate to support designated uses.²⁴⁸

Congress provided in the CWA that “it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this chapter to be met through the control of both point and nonpoint sources of pollution.”²⁴⁹ Unlike for point sources, however,

²⁴⁵ 33 U.S.C. § 1312(a) (1994).

²⁴⁶ See 33 U.S.C. § 1288 (b).

²⁴⁷ See ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE AND POLICY 968–69 (2d. ed., Little, Brown & Co. 2000).

²⁴⁸ See *id.* at 968.

²⁴⁹ 33 U.S.C. § 1251(a)(7).

Congress established far more voluntary, state-run programs for nonpoint sources.²⁵⁰

First, the CWA requires states to develop area-wide waste treatment management plans.²⁵¹ These plans are to include a process for identifying nonpoint sources and establishing feasible control measures for such sources.²⁵² States must submit their proposed plans to EPA.²⁵³ Area-wide treatment management plans, however, have widely been considered failures as nonpoint source pollution controls.

Second, Congress enacted section 319. Under section 319, states must develop nonpoint source management programs and identify those navigable waters that, “without additional action to control nonpoint sources of pollution, cannot reasonably be expected to attain or maintain applicable water quality standards.”²⁵⁴ In addition, states must identify specific categories of nonpoint sources, including those that add significant pollution to a portion of navigable water that cannot be expected to achieve the applicable water quality standards. The states must then describe the process for reducing the level of pollution, with reference to state and local programs for controlling the additional pollution from nonpoint sources.²⁵⁵

EPA recognizes that nonpoint source pollution is a significant threat to the ocean and coastal waters,²⁵⁶ even though much nonpoint source pollution derives from land-based runoff. EPA, however, has no authority to directly address such land-based water pollution, even if that pollution severely degrades ocean water quality.

3. TMDLs

More stringent regulation of nonpoint sources can result from Total Maximum Daily Load (TMDL) requirements. A TMDL is the maximum amount of a pollutant that can be discharged into the water area without violating the water quality standard.²⁵⁷ Under section 303(d), states must identify and prioritize state waters that do not meet the applicable water quality standards. After states have identified these waters, they must then establish the TMDLs of the pollutants “at a level necessary to implement the applicable water

²⁵⁰ See *id.* § 1288.

²⁵¹ *Id.* § 1288(b)(1)(A).

²⁵² *Id.*

²⁵³ See *Id.* § 1288(b)(1)(A).

²⁵⁴ *Id.* § 1329(a)(1)(A).

²⁵⁵ 33 U.S.C. § 1329 (a)(1)(B), (C), (D).

²⁵⁶ EPA OCEAN DISCHARGE CRITERIA REVISIONS, *supra* note 4, at 6–8.

²⁵⁷ See PERCIVAL ET AL., *supra* note 247, at 943–45.

quality standards.”²⁵⁸ This state determination is subject to EPA approval.²⁵⁹

Water bodies can violate water quality standards because of either point source or nonpoint source pollution. Consequently, states must take nonpoint sources into account when setting TMDLs and adjusting the relevant point sources’ NPDES permits.²⁶⁰ Therefore, TMDLs encompass both nonpoint and point sources.²⁶¹

However, even if EPA sets true water quality standards for the contiguous zone and the ocean, it is not clear that EPA would have the same duty to set TMDLs for ocean waters as states have to set TMDLs for navigable waters. EPA clearly can set *some* TMDLs because section 303 requires EPA to set them when states fail to do so.²⁶² Like the water quality standards provisions of section 303, however, the TMDL provisions focus exclusively on state-controlled waters.

EPA has arguably taken a broader view of TMDLs. In its CWA regulations, EPA defines a TMDL as “a written, quantitative plan and analysis for attaining and maintaining water quality standards in all seasons and for a specific water body and pollutant.”²⁶³ This definition suggests that TMDLs might apply wherever there are water quality standards that have not been met. Moreover, given its broad discretion and authority under the CWA, EPA could certainly *choose* to set TMDLs for ocean waters and then use those TMDLs to reach all sources of water pollution directly under federal CWA jurisdiction.

A more difficult issue, however, is whether EPA could use ocean TMDLs to force state-controlled point and nonpoint sources to comply with stricter requirements to ensure that ocean water quality standards were met. Such sources would be located landward of the outer, three-mile limit of the territorial sea. While EPA could turn to Supremacy Clause arguments to reach these sources, the lack of specific provisions for ocean TMDLs in the CWA and the focus of sections 208, 303, and 319 on giving states primary control over the water quality within their borders suggests that EPA should deal with such in-state pollution through the CWA’s transboundary pollution provisions, rather than through its TMDL provisions.

²⁵⁸ 33 U.S.C. § 1313(d)(1)(C).

²⁵⁹ *See id.* § 1313(d)(2).

²⁶⁰ *American Wildlands v. Browner*, 260 F.3d 1192, 1198 (10th Cir. 2001).

²⁶¹ *See Alaska Ctr. for the Env’t v. Browner*, 20 F.3d 981, 984–85 (9th Cir. 1994) (noting that TMDLs are an effective tool for achieving water quality standards in waters impacted by nonpoint source pollution).

²⁶² 33 U.S.C. § 1313(d)(2); *see also Browner*, 20 F.3d at 986–87 (affirming a district court order that EPA set TMDLs for Alaska).

²⁶³ Water Quality Planning and Management, 40 C.F.R. § 130.2(h) (2000).

4. Transboundary Water Pollution

Section 401 of the CWA creates procedures for dealing with water pollution that flows across boundaries. Under section 401(a),

Any applicant for a Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters, shall provide to the licensing or permitting agency a certification from the State in which the discharge originates or will originate . . . that any such discharge will comply with the [CWA]. . . . No license or permit shall be granted if certification has been denied by the State²⁶⁴

EPA can issue the certification if the state lacks authority to do so.²⁶⁵

Section 401(a) thus gives states considerable authority to veto or otherwise modify federally-issued permits that could affect water quality. In addition, when EPA determines that “such a discharge may affect . . . the quality of waters of any other State,” EPA must notify the other state, the licensing or permitting agency, and the applicant for the license or permit.²⁶⁶ The affected state then has sixty days to determine whether “such discharge will affect the quality of its waters so as to violate any water quality requirement in such State” and to notify EPA of that fact.²⁶⁷ EPA must then hold a hearing, and the licensing or permitting agency must “condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements.”²⁶⁸

State-issued NPDES permits are also subject to interstate requirements. States acquiring NPDES permitting authority for the navigable waters within their boundaries must “insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and . . . provide an opportunity for public hearing before a ruling on each such application”²⁶⁹ In addition, the permitting state must:

[I]nsure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit ap-

²⁶⁴ 33 U.S.C. § 1341(a)(2).

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.*

plication and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing²⁷⁰

In addition, the EPA Administrator can object to the offending permit and, if the permitting State does not cooperate, issue the permit itself.²⁷¹

Together, these transboundary provisions ensure that states have a say in permits that could affect the quality of navigable waters when either federal agencies or upstream states issue those permits. The Ninth Circuit, however, has already determined that the section 401 certification requirement does not apply to NPDES permits issued for discharges into the contiguous zone or the ocean because those discharges do not originate within the navigable waters.²⁷² For similar reasons, and because EPA is not a “state,”²⁷³ the provisions in section 401 protecting downstream states do not apply when discharges originating in states will affect the waters of the ocean and the contiguous zone.

EPA still retains its authority, however, to override any state NPDES permit issued. Specifically, EPA can, within ninety days of being notified of any state-issued NPDES permit, “object[] in writing to the issuance of such permit . . . as being outside the guidelines and requirements of this Act.”²⁷⁴ “Act” refers to the entirety of the CWA and thus includes the overall congressional objective “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters”²⁷⁵ as well as to EPA’s authority to implement the Act. Therefore, using its NPDES veto authority, EPA could force state-issued NPDES permits to comply with ocean water quality standards.

Such override authority, however, is limited to the state NPDES permit program and thus to point sources. EPA currently possesses no authority to affect nonpoint sources within state boundaries, no matter how large an effect those nonpoint sources may have on ocean water quality.

²⁷⁰ 33 U.S.C. § 1342(b)(5).

²⁷¹ *See id.* § 1342(d)(2), (4).

²⁷² *Natural Res. Defense Council, Inc. v. EPA*, 863 F.2d 1420, 1435 (9th Cir. 1988).

²⁷³ *See* 33 U.S.C. § 1362(3) (defining “State” for purposes of the CWA).

²⁷⁴ *Id.* § 1342(d)(2).

²⁷⁵ *Id.* § 1251(a).

CONCLUSION

As a class, NPDES permits for discharges into the ocean waters are rather limited. According to EPA, “[t]here are 265 NPDES ocean discharge permits subject to section 403 compliance requirements.”²⁷⁶ Eleven of those 265 permits, however, are general permits, “and over 9,900 individual facilities have filed Notices of Intent to obtain coverage under these general permits,” mainly composed of “offshore oil and gas exploration and production facilities, seafood processors, and storm water discharges,”²⁷⁷ but also including desalination plants, lumber harvest facilities, seawater treatment plants, sugarcane mills, petroleum refineries, pulp and paper mills, petroleum bulk handlers, organic chemical manufacturers, metal refineries, shipbuilders, brine disposal facilities, electric utilities, aquaculture farms, pharmaceutical manufacturers, and sulfur miners.²⁷⁸ Because EPA’s proposed new regulations operate only as ocean discharge criteria, these are the only entities affecting ocean water quality that the new requirements could affect.

Many more sources of pollution, however, affect ocean water quality than just point sources discharging into the oceans themselves. In state-controlled navigable waters, including the territorial sea, water quality standards trigger expanded protections under the CWA through the TMDL and transboundary requirements. While EPA has sufficient authority under the CWA to promulgate true ocean water quality standards for federal waters, the provisions of the CWA will almost certainly *not* allow EPA to use those ocean water quality standards to reach state-based nonpoint sources, no matter how severely those nonpoint sources might affect ocean water quality. EPA can affect state-based point sources through its NPDES permit override authority, but: (1) such override authority does not depend on EPA issuing ocean water quality standards; (2) nothing in EPA’s override authority would *compel* EPA to object to state-issued NPDES permits that adversely affect water quality in the contiguous zone and the ocean; and (3) EPA has been reluctant to use its override authority in any case.

What EPA’s proposed new ocean discharge criteria regulations demonstrate, therefore, is the current CWA’s gaping holes with respect to compelled ocean water quality protection. These holes are particularly cavernous regarding the relationship between pollution

²⁷⁶ EPA OCEAN DISCHARGE CRITERIA REVISIONS, *supra* note 4, at 22.

²⁷⁷ *Id.*

²⁷⁸ *Id.* at 24–32.

in the state-controlled navigable waters and the quality of ocean waters farther out to sea. Without these links, however, comprehensive water quality control is beyond EPA's regulatory command. The state-based focus of much of the CWA fails to acknowledge or address the expanding federal control over the seas, leaving ocean water quality largely a matter of EPA discretion and state cooperation rather than a mandated requirement to protect our nation's ocean resources.